Filed 12/21/09 F.E. v. Super. Ct. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

F.E.,

Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent;

LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,

Real Party in Interest.

B219042
(Los Angeles County
Super. Ct. No. CK51728)

ORIGINAL PROCEEDING; petition for extraordinary writ. James K. Hahn, Judge. Petition denied.

F.E., in pro. per., for Petitioner.

No appearance for Respondent.

Robert E. Kalunian, Acting County Counsel, James M. Owens, Assistant County Counsel, and Judith A. Luby, Principal Deputy County Counsel, for Real Party in Interest.

In his petition for an extraordinary writ, F.E. (Father) challenges a September 14, 2009 order setting a permanency planning hearing for January 11, 2010, as to his daughter, Y.E. We deny the petition because substantial evidence supports the juvenile court's findings that there was no substantial probability that Y.E. would be returned to Father in six months.

BACKGROUND

Y.E. is 10 years old. On March 16, 2003, Father, who had recently been released from prison, and Y.E.'s mother (Mother) got into an argument in Mother's van while it was parked in front of the home of paternal relatives. Father stabbed Mother with a screwdriver as Mother held three-year-old Y.E. on her lap, and Father stabbed Y.E. with the screwdriver on the left side of her body. When Y.E. called out for help, Father hit Y.E. on the face with his fist. Mother tried to get away from Father, but he grabbed Mother and Y.E. by their hair.

Father fled to Mexico with Y.E. after this domestic violence incident. The Los Angeles Police Department filed a child abduction report on behalf of Y.E. Father had a 1997 conviction for spousal abuse involving a previous relationship. In 1999 he had abducted his two older sons from that relationship, and his parental rights to his two sons had been terminated. The paternal grandmother adopted the children.

On March 25, 2003, Mother contacted the Department of Children and Family Services (DCFS) to report she was in Mexico and had custody of Y.E.; but Mother would not provide an address and was not cooperative with DCFS.

On March 27, 2003, DCFS filed a petition under Welfare and Institutions Code[1] section 300, subdivisions (a) (physical abuse by Father), (b) (failure to protect), (e) (severe physical abuse by Father), (i) (cruelty by Father), and (j) (abuse of sibling by Father). The juvenile court issued a protective custody warrant for Y.E. and arrest warrants for Mother and Father.

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[1] Unless otherwise indicated, all further statutory references are to the Welfare and Institutions Code.

On July 30, 2003, the juvenile court sustained the petition as to Y.E. and ordered that the parents were to have no family reunification services, but they were entitled to monitored visits after they contacted DCFS. Father was to have no reunification services under section 361.5, subdivision (b)(5) and (10).[2]

On December 12, 2003, Mother, with Y.E. and a sibling, appeared at a police station in Los Angeles to request that the charges against Father be dropped. Mother was arrested and Y.E. and her sibling were taken into custody by DCFS and placed together in foster care.

By January 2004, Father was incarcerated in state prison in Chino. On February 20, 2004, at the disposition hearing, the juvenile court ordered no reunification services for Father under section 361.5, subdivisions (b)(10)–(11) and (e)(1).[3]

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[2] Section 361.5 provides in pertinent part: "(b) Reunification services need not be provided to a parent or guardian described in this subdivision when the court finds, by clear and convincing evidence, any of the following: [¶] . . . [¶] (5) That the child was brought within the jurisdiction of the court under subdivision (e) of Section 300 because of the conduct of that parent or guardian. [¶] . . . [¶] (10) That the court ordered termination of reunification services for any siblings or half siblings of the child because the parent or guardian failed to reunify with the sibling or half sibling after the sibling or half sibling had been removed from that parent or guardian pursuant to Section 361 and that parent or guardian is the same parent or guardian described in subdivision (a) and that, according to the findings of the court, the parent or guardian has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half sibling of that child from that parent or guardian."

[3] Section 361.5 provides in pertinent part: "(b) Reunification services need not be provided to a parent or guardian described in this subdivision when the court finds, by clear and convincing evidence, any of the following: [¶] . . . [¶] (11) That the parental rights of a parent over any sibling or half sibling of the child had been permanently severed, and this parent is the same parent described in subdivision (a), and that, according to the findings of the court, this parent has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half sibling of that child from the parent. [¶] . . . [¶] (e)(1) If the parent or guardian is incarcerated or institutionalized, the court shall order reasonable services unless the court determines, by clear and convincing evidence, those services would be detrimental to the child. In determining detriment, the court shall consider the age of the child, the degree of parent-child bonding, the length of the sentence, the length and nature of the treatment, the nature of the crime or illness, the degree of detriment to the child if services are not

While incarcerated, Father remained in regular touch with DCFS by mail and telephone calls. Father requested visitation. DCFS told the court that paternal relatives had not come forth with the interest to facilitate visitation with Y.E. and Father. Father had telephone contact with Y.E. one to two times per month.

Father was released from prison in December 2004. Once released, he had two visits with Y.E., monitored at a DCFS office.

On February 2, 2005, Mother abducted Y.E. and her sibling from the foster mother and fled in a waiting car to Mexico. Father denied any involvement in the abduction, but he was subsequently arrested in August 2005 for forcing entry into Mother's home in Mexico and hurting Mother. Father was incarcerated in Mexico from August 2005 until February 2006, when he was released to United States authorities.

In June 2008, Father told DCFS Mother and the children had been seen in Los Angeles, but he refused to provide contact information for the people who said they saw them.

On January 22, 2009, DCFS reported the children and Mother had been found in Los Angeles on January 13, 2009. The children were suitably placed and Mother was arrested. Father was arrested on January 29, 2009, for a parole violation, namely, robbery, and was sentenced to 10 months in prison.

On August 14, 2009, Father filed a handwritten "Formal Notice" in the juvenile court, asserting his right to attend the juvenile court hearings. The "Formal Notice" had an attached declaration by Father, stating he was the father of Y.E. and her sibling. In a "Memorandum of Points and Authorities," Father admitted he made mistakes in the past, but said he loved Y.E. and he believed she needed him in her life. He requested that she be placed in a legal guardianship with a relative and cited to various sections of the Welfare and Institutions Code, the Family Code, and the Penal Code regarding

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offered and, for children 10 years of age or older, the child's attitude toward the implementation of family reunification services, the likelihood of the parent's discharge from incarceration or institutionalization within the reunification time limitations described in subdivision (a), and any other appropriate factors. . . ."

reunification services, equal custody rights, relative placement, and his right to be at the hearings. He also complained about his attorney's representation.

Father had not visited Y.E. due to his incarceration, but he maintained contact through letters. DCFS encouraged Y.E. to respond by letter or draw pictures, but she had chosen not to do so. DCFS continued to send letters and reports to Father in prison. In addition, a copy of the August 31, 2009 report was mailed to Father. The report indicated DCFS continued to recommend adoption for Y.E.

On September 14, 2009, the court established that the hearing was being held pursuant to section 366.3, in order to set a hearing under section 366.26. Father's attorney claimed Father received no notice that adoption was DCFS's recommendation. He asserted it was premature to set a section 366.26 hearing. DCFS's counsel asked the juvenile court to make section 366.3 findings and set the matter for a section 366.26 hearing in 120 days, during which time a home study and any appropriate relative visitation could begin. Father's attorney asked for a continuance. The juvenile court said it had not heard any good reason to continue the hearing.

The juvenile court designated Y.E. and her sibling a sibling group. The juvenile court found the placement of the children in foster care remained necessary and appropriate and DCFS had made reasonable efforts to finalize placement of the children. Father's efforts to alleviate the problems that had caused placement in foster care had been minimal and incomplete and there were compelling reasons not to return Y.E. to Father's care. The permanent plan of permanent placement in foster care was ordered to continue. Father's counsel's objections regarding notice were overruled. Father indicated he would be out of prison soon and reiterated he wanted to be present at all upcoming hearings.[4]

The juvenile court set a section 366.26 hearing for January 11, 2010. On September 18, 2009, Father's notice of intent to file a writ petition was filed with the

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[4] Father subsequently indicated he would be released from prison at the end of November 2009.

superior court; the notice of intent was signed by Father and dated September 14, 2009. On October 16, 2009, Father's counsel advised this court that under *Glen C. v. Superior Court* (2000) 78 Cal.App.4th 570 he was unable to file a petition for extraordinary relief on behalf of Father. Father filed the petition in propria persona on November 8, 2009.

Father's petition alleged the September 14, 2009 order was erroneous because he wanted parental rights of visitation and family placement, and there was "not enough time to prepare due to my incarceration." On November 4, 2009, the clerk of our court notified the parties that the matter will be decided on its merits. DCFS filed an answer to the petition for extraordinary writ.

DISCUSSION

Noncompliance with California Rules of Court

Rule 8.452 of the California Rules of Court requires that a writ petition to review an order setting a section 366.26 hearing include certain specified information. In particular, "[t]he petition must be accompanied by a memorandum" that provides a summary of the significant facts and supports each point with argument and citation to authority and the record. (Cal. Rules of Court, rule 8.452(a)(3) & (b); see also rule 8.456(a)(3) & (b).) A petition that fails to comply with these rules is subject to dismissal. We "dismiss as inadequate any rule 39.1B [now rule 8.452] petition that does not (1) summarize the particular factual bases supporting the petition, (2) refer to specific portions of the record, (3) relate the facts to the grounds alleged as error, (4) note disputed aspects of the record, and (5) have attached to it a particularized memorandum of points and authorities. [Citation.]" (*Cheryl S. v. Superior Court* (1996) 51 Cal.App.4th 1000, 1005, italics omitted; see also *Cresse S. v. Superior Court* (1996) 50 Cal.App.4th 947, 955–956.)

Father failed to comply with these rules. His petition does not include a memorandum or points and authorities, and he offers only the request for more time as "support" for his petition. There are no grounds for the petition. There is no factual basis for the petition.

Although we could dismiss the petition for its clear failure to comply with the applicable court rules, we decline to do so in light of the importance of the right at stake and the critical stage of these proceedings.

Abuse of Discretion

Although the petition is unclear, Father appears to contend that the juvenile court's decision to set the matter for a section 366.26 hearing was not legally correct and was an abuse of discretion. Father's argument is without merit.

Section 366.3 requires a status review be held for a dependent child at least every six months, where the child is placed in long-term foster care. (§ 366.3, subd. (d).) Section 366.3, subdivision (h) specifically addresses review hearings held for children placed in long-term foster care. It states, "At the review held pursuant to subdivision (d) for a child in long-term foster care, the court shall consider all permanency planning options for the child including whether the child should be returned to the home of the parent, placed for adoption, or appointed a legal guardian, or, if compelling reasons exist for finding that none of the foregoing options are in the best interest of the child, whether the child should be placed in another planned permanent living arrangement. The court shall order that a hearing be held pursuant to Section 366.26, unless it determines by clear and convincing evidence that there is a compelling reason for determining that a hearing held pursuant to Section 366.26 is not in the best interest of the child because the child is being returned to the home of the parent, the child is not a proper subject for adoption, or no one is willing to accept legal guardianship." The statute further states that a child may remain in long-term foster care only if the court can find the child is unlikely to be adopted or an exception contained in section 366.26, subdivision (c)(1) applies to the case. (§ 366.3, subd. (h).)

Therefore, section 366.3 expressly contemplates that a section 366.26 hearing will be held absent a compelling reason not to. It is the parent's burden to prove a case should not be set for hearing under section 366.26. (*Sheri T. v. Superior Court* (2008) 166 Cal.App.4th 334, 341.)

If a juvenile court is granted discretion to decide an issue, its decision should not be disturbed on appeal absent a clear abuse of discretion. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415.) A court abuses its discretion when it makes a determination that is "'arbitrary, capricious, or patently absurd.'" (*In re Mark V.* (1986) 177 Cal.App.3d 754, 759, quoting *In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 421.)

There is no question that the juvenile court's order setting a section 366.26 hearing was not an abuse of discretion and Father failed to meet his burden to prove a section 366.26 hearing should not be set. The foster mother wanted to adopt Y.E. Nothing more was needed to fulfill the requirement of the statute, in that clearly a more permanent plan was now available to the child. Father did not provide any reason not to set a section 366.26 hearing, arguing only that Y.E. was not yet in a permanent plan and that he had no notice of DCFS's recommendation. DCFS had recommended adoption in many prior reports, which were sent to Father. And Father now would receive notice and have ample time to prepare a defense for the upcoming section 366.26 hearing.

Father does not want to lose his rights to his child. But Father's rights cannot come first at this point. "A parent's rights to the care and companionship of [his] child are, of course, compelling. But the child's rights to a stable and loving family are equally compelling, and in any decision regarding the child's custody, the two must be balanced. The balance between the parent's and the child's rights shifts after the child has been removed from the parent's home for a substantial time, owing to abuse or neglect by the parent, and the parent has failed to correct the problems which led to the removal." (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 609.)

The juvenile court's order was not an abuse of discretion, and Father made no showing that a section 366.26 hearing should not be set. The juvenile court's order was based in the statutes and prevailing case law.

Time to Prepare Writ Petition

Father next contends that he did not have enough time to prepare his writ due to his incarceration. He says once he is released (by now, that may have occurred), he will hire an attorney. Yet Father has had legal representation in the juvenile court since his

first appearance. His attorney considered whether a writ petition should be filed on behalf of Father and determined it should not. There is no reason to believe any other attorney would not have done the same, given the record in this case.

Ineffective Assistance of Counsel

Father cannot and did not show he received ineffective assistance of counsel. Under section 317.5, a party represented by counsel in a dependency proceeding is entitled to "competent counsel" and may therefore raise a claim that counsel was ineffective. (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1667.) But a parent who claims that section 317.5 was violated must show "counsel failed to act in a manner to be expected of reasonably competent attorneys practicing in the field of juvenile dependency law." (*Kristin H.*, at pp. 1667–1668.) Father has the burden to show his counsel was ineffective but he did not do so. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) Even assuming arguendo Father's counsel failed him in some way, Father cannot prevail on his claim unless he can show that, in the absence of counsel's failings, a more favorable result was reasonably possible. (*People v. Ledesma* (1987) 43 Cal.3d 171, 217–218.) Father has failed to do so.

Communication with Y.E.

Father further contends he wrote many letters to Y.E. and there was no evidence of them in the record. This is not true. DCFS acknowledged on many occasions that Father went to great lengths to communicate with Y.E. despite his incarceration. In March 2009, DCFS noted Father sent drawings and wrote letters and attached the items to the report. DCFS later stated Father had written letters during the summer of 2009. But even if all of the letters were not produced in the record (and it is unknown whether this is true), this did not hurt Father, as DCFS clearly made the juvenile court aware that Father was making every effort to maintain contact with Y.E. This complaint has little basis in fact and fails to support a claim that a section 366.26 hearing should not have been set.

Visitation and Placement

Father further contends he is seeking extraordinary writ relief from an order "for parental rights of visitation & family placement." At the time of the hearing, Father

remained incarcerated in prison and unable to visit with Y.E. As for the placement, Y.E.'s permanent placement has not yet been decided — all options, including relative placement, are still being discussed. Thus, no juvenile court order existed barring placement with relatives that would allow an appeal on that issue in the writ petition.

DISPOSITION

The petition for an extraordinary writ is denied.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

CHANEY, J.

JOHNSON, J.